FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 155

MICHIGAN NATIONAL BANK, a banking association organized under the laws of the United States,
Appellant,
NATIONAL BANK OF WYANDOTTE,
THE FIRST NATIONAL BANK (Three Rivers, Michigan),
COMMERCIAL NATIONAL BANK OF IRON MOUNTAIN,
THE NATIONAL BANK OF JACKSON, and
THE FIRST NATIONAL BANK AND TRUST COMPANY OF KALAMAZOO,
banking associations organized under the laws of the United States,
Intervening Plaintiffs,
vs.
STATE OF MICHIGAN, DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN, and
LOUIS M. NIMS, State Commissioner of Revenue,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

RESPONSE OF MICHIGAN BANKS TO APPELLEE'S OBJECTIONS TO MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE

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The undersigned Michigan banks, now fifty-seven (57) in number, file this response so that there may be no misapprehension as to their reasons for filing or joining in the motion and in answer to the inference suggested by those objections that the applicants, at least other than the Community National Bank of Pontiac, were not informed of and not aware of the position taken in said motion.

As appears from the affidavit hereto attached, each of said sixty-eight (68) banks which originally joined in the motion specifically requested that its name be included as a moving party and every one of said banks received a galley proof of the motion and proposed brief in advance of filing, and consequently was fully and fairly apprised of the position being taken on its behalf. Although suggestions or criticisms were invited, none were received.

In view of the statements made in footnote 84, page 33, of Appellee's main brief, we respectfully advise the Court that none of the fees of the undersigned counsel or the costs of printing their motion and proposed brief is being borne by Appellant.

It is respectfully submitted that the applicants' motion should be granted.

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National Bank of Royal Oak
First National Bank, Quincy, Michigan
National Bank of Hastings

(List of Banks continued on next page)

Security National Bank of Manistee
National Bank of Eaton Rapids
First National Bank of East Lansing
First National Bank of Mt. Clemens
National Bank of Richmond
First National Bank of Niles
First National Bank, Sturgis, Michigan
First National Bank, Cassopolis, Michigan
Hillsdale County National Bank
National Bank of Jackson
Community National Bank of Ithaca
First National Bank of Kalamazoo
First National Bank of Three Rivers
National Bank of Wyandotte
Community State Bank, St. Charles, Michigan
Commercial Savings Bank, St. Louis, Michigan
Woodruff State Bank, DeWitt, Michigan
Loan and Deposit State Bank,
Grand Ledge, Michigan
Peoples Sate Bank, Williamston, Michigan
Peoples State Bank of Caro, Michigan
Saginaw Valley Bank
Capac State Savings Bank
Howard City State Bank
The Morley State Bank
First State Bank of Greenville
Wyoming State Bank, Wyoming Township,
c/o Grand Rapids, Michigan
Moline State Bank
Calhoun State Bank; Homer, Michigan
Delton State Bank
The Grosvenor Savings Bank, Jonesville, Michigan
Hillsdale State Savings Bank
The Olivet State Bank
Springport State Savings Bank
Wayne Oakland Bank, Royal Oak, Michigan
Clarkston State Bank
State Bank of Perry
Peoples State Bank of St. Joseph
Cass County State Bank, Cassopolis, Michigan

(List of Banks concluded on next page)

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Industrial State Bank, Kalamazoo, Michigan
Newport State Bank
The Michigan Bank, Detroit, Michigan
Coopersville State Bank
River Rouge Savings Bank
Hemlock State Bank
State Savings Bank, Clinton, Michigan
Citizens State Savings Bank of New Baltimore
Mt. Clemens Savings Bank
Macomb County Savings Bank, Richmond, Michigan
Citizens Bank of Saline
Saline Savings Bank
United Savings Bank of Tecumseh
Farmers State Bank of Concord

AFFIDAVIT OF WILLIAM B. HARTMAN, MEMBER OF THE FIRM OF HOWLETT, HARTMAN & BEIER

State of Michigan,
County of Oakland—ss.

William B. Hartman, of Pontiac, Michigan, deposes and says that he is the senior partner of the firm of Howlett, Hartman & Beier, attorneys for the Community National Bank of Pontiac and that for over twenty-five years said firm and its predecessors have acted as attorneys for said bank.

Deponent further says that said Community National Bank of Pontiac, has, since the adoption of Act 9 of the Public Acts of Michigan of 1953, consistently opposed the effect and validity of that act and in furtherance of that position, first, unsuccessfully sought to intervene in this cause and finally filed its motion for leave to file a brief *amici curiae* herein.

Deponent further says that his firm does not represent and never has represented the Appellant bank but is acting solely for the Community National Bank of Pontiac and those other Michigan banks which joined in the motion herein filed, each of which asked to join therein when they were informed that such action was about to be taken, it being understood that the fees and expenses of deponent's firm as well as the cost of printing the motion for leave to file brief *amici curiae* and the attached brief are to be paid solely by said Community National Bank of Pontiac.

Deponent says further that before said motion for leave to file a brief *amici curiae* was filed herein, galley proofs thereof and of the proposed brief attached thereto were mailed to each of said sixty-eight banks for approval with the request that corrections or revisions, if any, be communicated to deponent's firm by noon Wednesday, November 23, 1960: thereafter, no objections or suggestions for correction having been made by any of said sixty-eight (68) banks or by any one on their behalf, said motion and brief were printed and filed; subsequently and recently, eleven (11) of those banks, The Bank of Albion, The State Bank of St. Johns, The Farmers Bank of Mason, The Farmers and Merchants State Bank of Merrill, The St. Clair Shores National Bank, The Community National Bank of Ithaca, The Lapeer Savings Bank, The Isabella County State Bank, Mt. Pleasant, Michigan, The Peoples Bank of Bronson, The Benton Harbor State Bank and The Milan State Bank, all state banks, have asked to withdraw as moving parties.

Further deponent sayeth not.

William B. Hartman.

Subscribed and sworn to before me, a Notary Public, this 19th day of December, A. D., 1960.

Nick P. Krust,
Notary Public, Wayne County, Michigan,
My commission expires June 13, 1964.

REPLY BRIEF OF APPELLANT

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

Reply Brief of Appellant

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Michigan National Bank

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Appellees.

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Reply Brief of Appellant

Act 9 of the Public Acts of Michigan of 1953 was considered to be of doubtful validity at the very time of its enactment.[1] We submit that a careful reading and analysis of appellee's complex 234 page brief fails to dispel such doubts. Act 9 contravenes R. S. 5219.

[1] See infra, pp. 34-6. See Statement and Brief of Appellant, Michigan National Bank, re Appellee's Objection to Motion of Sixty-eight Banks in Michigan for Leave to File a Brief Amici, pp. 2-5; Appellee Objections to Motion of Sixty-Eight Banks in Michigan for Leave to File a Brief Amici and Affidavit attached, pp. 9, par. 1; 15,16,20-1.

In its brief, appellee advances a series of arguments which, in effect, would require this Court to:

(1) rewrite the basic provisions of R. S. 5219;

(2) overrule decisions of this Court defining "other moneyed capital", "coming into competition with the business of national banks", and what constitutes tax discrimination;

(3) consider an investment in the shares of a commercial enterprise for profit (i.e., a savings and loan association) the equivalent of a deposit-debt (i.e., a bank deposit), notwithstanding that by statute such investment is "share capital",[2] associations are prohibited from taking "deposits",[3] and "investors in savings and loan associations are purchasers of stock";[4]

(4) conclude that because banks and savings and loan associations were at one time not in competition (because banks were then without power to make mortgages or to take savings) as a matter of law they cannot now or ever be in competition under R. S. 5219—no matter how keen or extensive the competition in fact may be; and

(5) hold that this Court is foreclosed by an inexorable, inflexible law from considering the facts regarding the operations of savings and loan associations today

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[2]17 Mich. Stat. Annotated (M.S.A.) 23.541 (D); 23.542; 17 M.S.A. Cum. Supp. 1959, 23.545; Michigan Attorney General Opinions, 1913, p. 83; 12 U.S.C.A. Sec. 1464(b).

[3]17 M.S.A. 23.580; 12 U.S.C.A. Sec. 1464(b).

[4]*Michigan Savings and Loan League, et al.* v. *Municipal Finance Commission of Michigan* (1956) 347 Michigan 311, 319; 79 NW 2d 590; *Wisconsin Bankers Association* v. *Federal Home Loan Board* (1960) U.S. District Court for District of Columbia (not yet reported).

and from determining that there is no "just cause" for a state to exempt them from taxation because in prior times there may have been reason for a state so to do.

I

Contrary to Appellee's contentions—

Money invested in and Employed by Savings and Loan Associations is "other moneyed capital . . . coming into competition with the business of National Banks" under R. S. 5219.

The record in this case shows without dispute that:

(1) Savings and loan associations are the principal competitors of national banks in Michigan for the residential mortgage loan business;[5]

(2) The capital employed by them in this business is substantial in amount[5] (presently in excess of $1,600,000,000 in Michigan); and is substantial when compared to the total capitalization of national banks in Michigan[6]; and

(3) Such mortgage business is an important and essential phase of the business of national banks in Michigan, including that of appellant.[7]

Notwithstanding this uncontroverted proof, appellee contends that, as a matter of law, national banks and their shareholders in Michigan are not protected by R. S. 5219 from tax discrimination favoring such competition. Appellee asserts that the money invested in savings and loan associa-

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[5]See Appellant's Brief pp. 9-17 and record references in support thereof.

[6]See Appellant's Brief pp. 30-31 and record references in support thereof.

[7]See Appellant's Brief pp. 10-11, 42-44 and record references in support thereof.

tions is not "other moneyed capital . . . coming into competition with the business of national banks" because:

(a) savings and loan associations are different in nature, character, purpose and organization from national banks because they may not accept or do business on deposits, and they are not permitted to do a general banking business;

(b) investments in savings and loan shares are like bank deposits and do not constitute capital invested in and employed by a business; and

(c) no matter how substantial such capital is when compared to total capitalization of all national banks in Michigan, it must also be shown that it is substantial compared to **all** other moneyed capital in Michigan.

Contrary to Appellee's contentions—

Other Moneyed Capital coming into competition is not limited to capital invested in a business which accepts deposits or engages in a general banking business.

Throughout its entire brief, appellee urges as its central and dominant theme—with variations—that R. S. 5219 does not apply to money invested in and employed by savings and loan associations because—unlike national banks—such associations cannot accept deposits or engage in a general banking business.[8] Obviously, the only business which may accept deposits or do a general banking business is a bank. Most states, including Michigan, so provide by statute. Since no business but a bank may accept deposits or engage in a general banking business, appellee would by its argument exclude from the ambit of R. S. 5219 all other moneyed capital employed by individuals, partnerships or corporations in financial businesses—other than banks—no matter how sub-

[8] Appellee's Brief, pp. 41, 43-5, 68, 181-2 (footnote 168), 189, 205, Par. (11).

stantially such capital competed with the business of national banks.

Congress in enacting and amending R. S. 5219—specifying the permissible limits within which a state might tax national bank shares—did not limit R. S. 5219 in this way. To the contrary, Congress in R. S. 5219 expressly provided:

> "Sec. 1(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon **other moneyed capital** in the hands of individual citizens of such State **coming into competition with the business of national banks . . .**"

Originally, in 1864 when R. S. 5219 was enacted, Congress permitted states to tax national bank shares provided that the rate was not greater than that imposed upon (1) other moneyed capital and (2) shares of state banks. By amendment in 1868, Congress eliminated the second limitation relating to state bank shares as surplusage, and retained only the moneyed capital limitation. (February 10, 1868, ch. 7, 15 Stat. 34).

Consistently thereafter this Court has refused to recognize the argument that R. S. 5219 applies only to state banks or their shares. *Merchants National Bank* v. *Richmond,* 256 U. S. 635; 65 L. Ed. 1135; *First National Bank of Hartford* v. *City of Hartford,* 273 U. S. 548; 71 L. Ed. 767.

Congress also has consistently refused to limit "other moneyed capital" to capital invested in shares of state banks despite repeated bills introduced and proposals so to do.[9]

Professor Woodworth, the paid expert upon whom appellee relies throughout, predicates his entire testimony upon a

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[9] See Appellants Brief, p. 41 and particularly footnote 35 for references.

thesis which is directly contrary to that of Congress and of this Court upon the subject. Woodworth said (R. 844a):

> "Congress in my opinion is concerned with the protection of national banks from discriminatory taxes levied by the separate states in favor of state chartered institutions and private commercial banks performing substantially the same services. The competitive area with which Congress was most concerned was monetary services as listed above, engaged in at that time by state chartered banks, trust companies, private loan companies and private bankers."

See footnote 20, infra, p. 13.

Contrary to appellee's contentions "other moneyed capital" has not been limited to businesses which may accept and employ deposits in its business or which are engaged in the general business of banking. *Hartford, supra*, pp. 556-7; *Minnesota* v. *First National Bank*, 273 U.S. 561, 567; 71 L. Ed. 774.

Contrary to Appellee's contention—

> **"Moneyed capital . . . coming into competition," as defined by this Court, is not limited to capital employed by a bank or by a business similar in character, purpose and organization.**

Appellee insists throughout that businesses and institutions not similar in character, purpose and organization to national banks cannot be "moneyed capital coming into competition" with them.[10] Appellee asks "How can fundamentally different institutions be said to be in 'substantial competition' within the meaning of Sec. 5219? How can a non-stock entity that cannot accept deposits compete with the capitalized stock corporation in the latter's employment of

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[10] Appellees Brief, pp. 37, 54, 83, 84, 97, 141, 157, 205, (Par. (9)).

deposit moneys?"[11] (Appellee's Brief p. 84. See illustration, urging this proposition footnote 168 in Appellee's Brief, 181-2).

This Court categorically answered these questions in *Hartford, supra*, when it said (273 U.S. 577-8):

> ". . . Competition in the sense intended arises **not from the character of the business** of those who compete **but from the manner of the employment of the capital** at their command . . . (557)
>
> "To so restrict the meaning and application of R. S. 5219 would defeat its purpose . . ." (558)

Contrary to Appellee's contentions—[12]

> **The area of competition of the "other moneyed capital" need not be in all phases of the business of national banks—so long as such competitive business is substantial in amount and constitutes a substantial phase of the business of the bank.**

See Appellant's Brief on the law pp. 34-7; 39-44.

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[11]Throughout Appellee's Brief (pp. 169, 68, 41, 108), appellee asserts that appellant bank in the mortgage business employs moneys **only "from deposits,** and **not from its capital account."**

This statement is in error. Appellee takes one sentence out of context from the testimony of Russell Fairless, Vice President of appellant bank, (R. 687a), when his entire testimony is clearly and unequivocally the other way. Because appellant bank finds no necessity to trace or allocate the source of its funds used in the mortgage business—as between capital or deposits (R. 869a)—does not warrant appellee's assertion that therefore only deposit funds were used. The testimony of Fairless is clear. "We don't break it down . . . we use the capital in every area." (R. 688-9a)

> "Q: You were asked by Mr. Dexter what funds are used in . . . making loans . . . ?
>
> "A: **We use all of the funds, capital, surplus, undivided profits, reserves, deposits, everything."** (R. 708a)

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[12]Appellee's Brief, pp. 37, 41, 56, 85, 116 ("Second" paragraph), 184-5, 202.

Where, as here, the competitive business constitutes an important and essential part of the entire banking business of appellant and of all national banks in Michigan, the adverse impact of tax discrimination favoring the banks' competitors is obvious. As this Court said in *Hartford, supra,* (273 U.S. 558):

> ". . . With the great increase in investments by individuals and the growth of concerns engaged in **particular phases** of banking shown by the evidence in this case and in *Minnesota* v. *First National Bank of St. Paul* . . . (273 U.S. 561, 567) discrimination with respect to capital thus used could readily be carried to a point where the business of national banks would be seriously curtailed . . ." (p. 558).

Contrary to appellee's contention (Brief pp. 198-203), *Hartford* does not hold that there must be discrimination "across the board" as to businesses, which, taken collectively, compete with all or virtually all phases of the national banking business. This Court said in *Hartford*, at p.556:

> ". . . the requirement of approximate equality in taxation is not limited to investment of moneyed capital in shares of state banks or to competing capital employed in private banking. The **restriction applies** as well **when the competition exists only** with respect **to particular features of the business of national banks . . .**"

See *infra,* p. 27, footnote 35a.

It is clear beyond question that the competition of saving and loan associations with appellant and other national banks in Michigan in the residential mortgage business is substantial in amount, and that such business constitutes a substantial, "sizeable and important" phase of the business of appellant and other national banks in Michigan. It is not an unimportant and too "narrow and restricted field"

to be within R. S. 5219, as asserted by appellee. See facts stated in Appellant's Brief, pp. 9-10; 42-44 and particularly footnote 37, p. 44.

Contrary to Appellee's contentions—[13]

"Other moneyed capital" under R. S. 5219 need not be substantial as compared to all moneyed capital employed in the state—so long as it is "substantial when compared with the capitalization of national banks."

Appellee's contention on this point is completely answered by *Hartford, supra,* p. 558 and is discussed in Appellant's Brief pp. 30-1.

Not only is the amount of competing capital of the savings and loan associations in Michigan shown to be three times the total capitalization of national banks in Michigan, but there is also extensive and voluminous proof that the amount of such savings and loan competition in the residential mortgage business is substantial in comparison to all such residential mortgage business done by all competitors in such business—other banks, insurance companies, mortgage businesses operated corporately, by partnership and individuals, credit unions and others. This proof, though relating specifically to the seven counties where appellant bank does business, is undoubtedly representative of the entire state. See footnote 34, pp. 31-2 of Appellant's brief and record references therein cited.

Contrary to Appellee's contentions—

Investments in savings and loan associations constitute "moneyed capital" within R. S. 5219 and are not deposit-debts such as deposits in a bank.

"Moneyed capital" under R. S. 5219 is money invested in "enterprises in which the capital employed in carrying on

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[13] Appellee's Brief, pp. 40, 56, 57, 69, 88 (f.n. 114), 94 (paragraph 2), 183.

its business is money, where the object of the business is the making of profit by its use as money . . . reduced again to money and reinvested." *Mercantile Bank* v. *New York* 121 U.S. 138, 157; 30 L. Ed. 895.

Such moneyed capital under R. S. 5219 may be money, as described above, employed by an individual, a group of individuals, a joint enterprise, or as a partnership (whether limited or general), in a business (such as the mortgage business) in competition with a substantial phase of the business of national banks, *Hartford, supra,* pp. 553, 555; 558; *Minnesota, supra,* p. 567; *First National Bank* v. *Anderson* 269 U.S. 341, 347-8; 70 L. Ed. 295; *Merchants National Bank* v. *Richmond* 256 U.S. 635, 639; 65 L. Ed. 1135. Similarly, such moneyed capital may also be money invested by individuals in "shares of stock or other interests . . . in all enterprises in which the capital employed in carrying on its business is money . . . " *Mercantile, supra,* p. 157; *Talbott* v. *Silver Bow County* 139 U.S. 438, 448; 35 L. Ed. 210.

Such moneyed capital need not be employed in a business which accepts deposit or engages in a general banking business, *supra,* pp. 4-6. Nor need it be a share of bank stock or its equivalent, as appellee contends. The only capital which is the equivalent of national bank stock is stock in a state or private bank. The Fourteenth Amendment to the Constitution of the United States protects national bank stock from discrimination favoring such equivalent moneyed capital, namely, stock in state or private banks. However, it is clear, and has been repeatedly held by this Court, that R. S. 5219 is not limited in its protection of national bank shares to the equivalent of shares of bank stock. *Richmond, supra,* p. 639; *Hartford, supra,* p. 556; cf. *First National Bank of Shreveport* v. *Louisiana State Tax Commission*, 289 U.S. 60; 77 L. Ed. 1030; see Appellant's Brief pp. 40-41, 78. Appellee's contention that money invested in shares of savings and loan associations is not moneyed capital under R. S. 5219 because

it is not the equivalent of national bank shares is clearly erroneous.

Appellee contends that an investment in shares of a savings and loan association is not capital at all, but rather is a deposit, like a bank deposit, and therefore is not moneyed capital under R. S. 5219.[14]

That investors in savings and loan associations are stockholders—not depositors (debtors), like bank depositors—is well established by statute and decisions. See Appellant's Brief, pp. 54-57.

To maintain its present contention that an investment in shares of savings and loan associations is like a deposit (debt) in a bank would require this Court:

(a) to ignore both the Michigan and Federal statutes, under which savings and loan associations are respectively organized and operate, which expressly and unequivocally provide that such investments constitute "share capital," or "capital stock,"[15] prohibit such associations from accepting deposits,[16] and provide that even after notice of withdrawal, such "shareholders . . . shall remain shareholders until paid and shall not become creditors"[17] and

(b) to overrule both the recent Michigan Supreme Court decision, *Michigan Savings and Loan League, et al* v. *Municipal Finance Commission of Michigan, supra,* 347 Mich. 311, 319, 322; 79 N.W. 2d 590, constru-

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[14] Appellee's Brief, pp. 31, 42, 70-1, 116 (Par. "Third"), 173-4, 189, 194-5.

[15] 17 Mich. Stat. Annotated (MSA) 23.541 (D); 23.542; 17 M.S.A. Cum. Supp. 1959; 23.545. Michigan Attorney General Opinions 1913, p. 83.

[16] 17 M.S.A. 23.580; 12 U.S.C.A. Sec. 1464(b).

[17] M.S.A. Sec. 23.546.

ing both the Michigan statute and the Federal statute under which these associations are organized, holding that "in substance . . . investors in savings and loan associations are . . . purchasers of stock therein," (rejecting the contention that "investments in savings and loan associations should not be regarded as stock purchases . . . [and] that the transaction is analogous to a deposit in the savings department of a bank,")[18] and a recent decision of a Federal Court to like effect.[19]

Nowhere in appellee's voluminous brief is this leading Michigan case mentioned or discussed, although in 1956 the Attorney General of the State of Michigan before the Michigan Supreme Court successfully and strenuously assailed the very proposition he now urges here. He there argued at length to the Supreme Court of Michigan that it was his considered belief and understanding that:

"PAYMENTS ON SHARES IN SAVINGS AND LOAN ASSOCIATIONS DO NOT CONSTITUTE DEPOSITS"

(Brief of Attorney General, for Municipal Finance Commission of the State of Michigan, pp. 14 et seq.). (Emphasis by capitalizing that of Michigan Attorney General).

The Attorney General of Michigan has always heretofore been of the opinion that a shareholder of a Michigan savings and loan association is a stockholder and **not a creditor.**[19a] Op. Atty. Gen. 1933-4, p. 29.

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[18] *Michigan Saving and Loan Leagues, supra,* 347 Mich. at p. 319.

[19] *Wisconsin Bankers Association, et al.* v. *Federal Home Loan Board* (1960) U. S. District Court for District of Columbia (not yet reported).

[19a] Prior to this litigation the Michigan Bankers Association took the position (in a pamphlet prepared and published by it and circulated to the general public by banks generally, **"Facts** about the difference between banks and savings and loan associations" (Ex. 217, R. 1316-7a)) stating that in **fact** and in practice, " . . . **banks accept deposits. Savings and loan associations accept investment in shares . . . Bank depositors are creditors. Association members are shareholders."**

Expedience does not change substantive law. Nor, we submit, does the theoretical testimony of Appellee's witness, Professor Woodworth,[20] change the Federal or Michigan statutes or the decisions holding that "in substance . . . investors in savings and loan associations are . . . purchasers of stock therein." (Appellant objected to this testimony (R. 805a-7a), which objection was sustained by the trial court, and a separate record was made thereof (R. 810a)).

On cross-examination, Professor Woodworth was obliged to admit that "a savings depositor in a commercial bank is a creditor . . . whereas in Michigan an investor in shares in

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[20] Although Professor Woodworth admitted "I am not familiar with the Michigan law" (R. 893), he would rewrite the Michigan (and Federal) statute and would overrule the above Michigan decision.

Moreover, Professor Woodworth does not approve of and would rewrite R. S. 5219. Although he admitted that "the commercial banks making mortgage loans on residential property compete with savings and loan [associations] in that area and vice versa" (R. 869a), it is his theory that the difference in character, purpose and organization of national banks (which do a general banking business) from savings and loan associations (which may not do a general banking business) controls the question of competition under R. S. 5219—not the manner of employment of capital by each. See *supra*, pp. 6-7. See Appellee's brief pp. 42-3. Professor Woodworth's opinion is directly contrary to that of this Court in *Hartford, Minnesota* and *Richmond, supra*, and to that of the Comptroller of Currency; see Appellant's Brief, p. 83.

He also disagrees with the standard set by Congress in R. S. 5219 that the state tax on national bank shares shall "not be at a greater rate" than imposed upon "other ~~managed capital~~ money," and insists that the proper way to determine tax burden is upon gross assets of banks and of the competing institutions, without deducting liabilities. In effect he would substitute a tax on assets, which is not permitted by R. S. 5219. Thus his opinion is contrary to that of this Court, rejecting such a contention in *Minnesota* v. *First National Bank*, 273 U.S. 561, 564; 71 L. Ed. 774; *Des Moines National Bank* v. *Fairweather*, 263 U.S. 103, 68 L. Ed. 191. See Appellant's Brief, pp. 52-3.

a savings and loan association is a shareholder in the corporation . . . legally speaking" (R. 884a). And also factually (R. 884a).[21]

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[21]On cross-examination, Professor Woodworth admitted: "Savings depositors in a national bank . . . are merely creditors of the bank (R. 885a), [See M.S.A. Sec. 23.546], whereas "in savings and loan [associations] there are not any depositors" (R. 885a). The commercial bank agrees to pay an agreed amount of interest to the depositor . . . and if it fails to pay that interest, the depositor can sue . . . (R. 884a), whereas "There is no agreed rate of return on savings [and loan] association shares" and a dividend may be declared and paid by the directors only if and to the extent earnings are sufficient (R. 884a). In the event of insolvency or liquidation a depositor is paid before shareholders in a national bank (R. 885a) and although savings and loan associations have no depositors, all debts are paid ahead of the shareholders (R. 885a). [See Opinion of Attorney General of Michigan 1926-8, p. 267]. Unlike a depositor in a bank, the shareholder of a savings and loan association is the owner of the undivided profits and surplus in the event of liquidation (R. 885a) and if the association loses money it reflects upon his interest as a shareholder (R. 885a).

"An investor in the savings and loan association invests primarily for return . . . and safety of the principal (R. 886a) and the more money an association makes there is "more money available for dividends (R. 885a). Since in a savings and loan [association] there are no deposit liabilities and in the bank there is a substantial deposit liability . . . shares in savings and loan associations have a greater degree of safety than shares of national bank[s]" (R. 886a). Because of "deposit liability," the Professor admitted that "the risk of a shareholder in national bank shares is substantially greater than the risk of a shareholder of a savings and loan association (R. 886a)." Like any stock, the more risk taken, the greater the possibility that a person "might make more money, but also might lose more money (R. 887a)." "An investor [in a savings and loan association] is interested in the return of his investment . . . to make as much money as he can on his investment (R. 900a)." "The higher the return they get . . . the better they like it . . . and the more people are attracted to investing in those shares."

Clearly, an investment in savings and loan association shares is an investment in "capital" stock of a "private corporation for profit,"[22] in which yield and safety are paramount, rather than equity growth. As the Michigan Supreme Court said in *Michigan Loan League, supra,* such investment is not "in substance . . . analogous to a deposit in the savings department of a bank."

II

Contrary to Appellee contentions—

Act 9 violates R. S. 5219 by taxing national bank shares "at a greater rate than is assessed upon other moneyed capital . . . coming into competition with the business of national banks."

Appellee does not deny that Act 9 (and the other minor state taxes) taxes national bank shares at a rate approximately 8 times greater than shares of Michigan savings and loan associations and 13 times greater than the shares of federal savings and loan associations.

The gist of appellee's argument is that even though the rate is greater (and the shares in these associations are

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[22]Attorney General's statement to Michigan Supreme Court, *Michigan and Loan League* v. *Municipal Finance Commission, supra,* brief p. 7.

Not only does the statute under which the associations are organized designate investments therein as "share capital" and prohibit the taking of "deposits" (footnotes 2 and 3, *supra,* p. 2), so also do their articles of incorporation and their by-laws, under which they operate (R. 1026a), and their share certificates issued to investors. Although copies of such certificates were introduced into evidence none was incorporated in printed record. For convenience, copies are attached hereto as Appendix A.

"other moneyed capital")[23]—because the tax is upon "two distinctly different types of institutions" (Appellee Brief p. 97)—[(1) banks engaging in banking operations use deposit funds (debt) and (2) savings and loan associations may not take or use deposits]—there should be some other test of discrimination employed than the one expressly provided by Congress in R. S. 5219, i.e. that the tax shall not be at a "greater rate than is assessed upon other money capital".

Congress in R. S. 5219 did not provide that there be a different test of discrimination where moneyed capital is employed by "different types of institutions," as appellee suggests. This Court has repeatedly held that "moneyed capital" under R. S. 5219 applies to those "individuals and firms [who] **do not receive deposits**" *(Hartford, supra,* p. 555) and "the requirement of approximate equality in taxation **is not limited to investment of moneyed capital in shares of state banks** . . . **or** private **banking.**" (p. 556) **"Competition** in the sense intended **arises not from the character of the business** . . . but from **the manner of the employment of the capital** at their command." To like effect, *Minnesota, supra,* p. 567. See *supra* pp. 4-8.

The fact that the competing business in which the other moneyed capital is employed does not receive deposits or borrow extensively[24] does not permit a state to tax it at a lesser

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[23]If shares in savings and loan associations were not "other moneyed capital", discussion of discrimination would be unnecessary because R. S. 5219 protects national bank shares only as against discrimination favoring "other moneyed capital".

That moneys invested in and employed by savings and loan associations are "other moneyed capital . . . coming into competition," has been fully discussed.

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[24]Borrowings by the 16 savings and loan associations operating in the seven cities where appellant bank has offices aggregated $4,605,000 outstanding at the end of the fiscal period of each in 1952. (R. 977A, 982-7a, 1008a, 1017a)

rate than national bank shares. *Hartford* necessarily rejects this contention. Cf. *First National Bank of Shreveport*, Appellant's Brief pp. 40-41, *supra*, pp. 4-8. The moneyed capital—which Congress in R. S. 5219 said may not be favored—is that of an individual, or as invested by him in shares of a corporation, in a partnership or other business, which competes with a substantial phase of the business of national banks, whether or not or to what degree, they take deposits or borrow money to use in such business—even though they are not engaged in the general banking business. Congress repeatedly has refused to limit other moneyed capital to that invested in other banks. (See Appellant's Brief, footnote 35, page 41).

Notwithstanding, appellee (and its witness Woodworth) insists throughout its brief that "other moneyed capital" must be limited to like institutions who take and use deposits in the general banking business—i.e. other banks (see *supra*, p. 5); or that a different test of discrimination be substituted for that expressly provided by Congress in R. S. 5219 and as determined by this Court.

In one effort to offset the fact that national banks employ capital and deposits (for which deposits the bank is liable) whereas savings and loan associations employ only capital and cannot take or use deposits), appellee urges that the ratio of burden of the taxes upon total assets—without deducting liabilities—be the controlling test of discrimination under R. S. 5219. This very same argument was rejected by this Court in *Minnesota v. First National Bank*, *supra*, at page 564:

> ". . . it is urged, if bank shares were taxed at the same rate without deducting the bank's liabilities in ascertaining the value of their shares, the amount of the tax would be approximately the same. **This argument ignores the fact that the tax authorized by § 5219 is against the holders of the bank shares** and **is** measured by the **value**

> **of the shares,** and **not by the assets of the bank without deduction of its liabilities,** *Des Moines National Bank* v. *Fairweather,* 263 U.S. 193, and that the **bank share tax must be compared with the tax assessed on competing moneyed** capital of individuals **invested** in credits, or the tax on capital invested by individuals in the shares of **corporations whose business competed with that of national** banks . . . "

Appellee, in another effort to avoid the test prescribed by the statute, argues that share capital of savings and loan associations is not other moneyed capital, but is a deposit-debt, like a deposit in a commercial bank,[25] and therefore, the shares of savings and loan associations—contrary to the Michigan statutes taxing such associations and their shares—should be valued by excluding the capital, and only should include reserves and undivided profits. This argument has been completely answered in Appellant's Brief, pp. 53-59 and *supra,* pp. 9-15.

The suggestion of appellee that if the tax be on shares of a savings and loan association that it also should be on the

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[25]It does not follow as appellee suggests (Appellee's Brief, pp. 74-5, 173) that if savings and loan shares are other moneyed capital that then too deposits in a commercial bank are other moneyed capital.

Deposits in a bank are a debt—a liability and not an investment in a share of stock of a corporation or an interest in a partnership or other business enterprise. "Investors in savings and loan associations are . . . purchasers of stock therein." *Supra,* pp. 9-15.

While not before this Court in this case, this Court has indicated in Mercantile, *supra,* that "deposits" in *mutual* savings banks are other moneyed capital because they represent the sole proprietary interest in such business (see Appellant's Brief, p. 58). We at no time suggested—and at all times have denied—that a deposit in a national or state bank, having capital stock, was anything but a debt-liability. It is not moneyed capital.

deposits[26] of the banks is merely a different version of the total asset (without deducting liabilities) tax test rejected by this Court in *Minnesota*. As stated in *Minnesota*, a tax on shares (such as Act 9) can not be treated as a tax on the bank itself or upon or measured by the gross assets of the bank without deducting deposits and other liabilities.

Appellee suggests (Appellee's Brief, p. 114) that if the State of Michigan had provided for a valuation of bank shares and other moneyed capital on a capitalization on one year's earnings (before Federal income taxes) method, that there would be no discrimination against appellant bank as compared with the 16 savings and loan associations. This suggestion has several basic fallacies: (1) Act 9 of the State of Michigan did not impose such a tax or provide for a valuing of national bank shares, savings and loan shares, or other moneyed capital in such a manner. It specified with particularity the method of valuation of the shares of banks—paid in capital, surplus and undivided profits—which is a reasonable method of valuation. (2) Capitalization of only one year's earnings before income taxes (as suggested by appellee) certainly is not an established, reasonable or fair method of valuation of shares. (3) Since this hypothetical method was not provided under Act 9 and was not applied to each and all of the other national banks in the State, nor to each and all savings and loan associations in Michigan, nor to any other moneyed capital in the state—with earnings or losses varying in each case—it is impossible to determine whether such a tax would have met the mandate of R. S. 5219. Certainly, there can be no assumption of tax equality required under R. S. 5219.

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[26]Appellee again erroneously states that appellant bank only used deposits in its mortgage loan business. This is not so—it (and all other national banks) employ their capital, surplus and undivided profits in each and all phases of its business. See footnote 11, *supra*, p. 7.

Appellee throughout attempts to conjure up different types of taxes or methods of valuation which the State of Michigan might have enacted[27] and attempts to substitute or apply a different law or tax standard than was enacted by Congress under R. S. 5219, as construed by this Court. We are not here concerned with a hypothetical Federal statute limiting state taxes on national banks or their shares, nor with a hypothetical state tax. Congress enacted R. S. 5219 and Michigan enacted Act 9. Those are the only statutes before us. Does Act 9 violate R. S. 5219 is the question?

Under these laws it is clear that Act 9 violates R. S. 5219. As this Court stated in *Pelton* v. *National Bank*, 101 U.S. 143, 146; 25 L. Ed. 901:

> "It is sufficient to say that we are quite satisfied that any system of assessment of **taxes which exacts** from the owner of the shares of a national bank **a larger sum in proportion to their actual value** than it does from the owner of other moneyed capital **valued in like manner,** does tax them at a greater rate within the meaning of the act of Congress."

This is the test which has been consistently followed by this Court. *Merchants National Bank of Richmond* v. *Richmond, supra; Iowa-Des Moines National Bank* v. *Bennett* 273 U.S. 561; 71L. Ed. 774; *Minnesota* v. *First National Bank of St. Paul, supra;* and *First National Bank of Guthrie Center* v. *Anderson, supra.*

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[27]Appellee suggested several hypothetical comparatives—not in the law—stating " . . . appellees are not urging that any one of these particular comparatives constitutes the best method of equating the effect of the Michigan tax structure on these non-comparable, noncompetitive types of institutions." Appellees' Brief, p. 112.

III

Contrary to Appellee's contentions—

Congress has not provided or indicated that moneys invested in or employed by savings and loan associations are not "moneyed capital" under R. S. 5219.

Appellee, in its Brief, pp. 25-26, 155-166, asserts the erroneous proposition that "Congress has made clear that the phrase 'other moneyed capital . . . coming into competition with the business of national banks,' as used in §5219, does not include savings and loan associations."

In support of this proposition appellee is silent as to the clear language of R. S. 5219—which specifically excepts **only** personal investments **not in competition.** Nor does appellee refer to any Congressional history relating to R. S. 5219 that indicates an intent of Congress to withdraw from R. S. 5219 moneyed capital invested in and employed by savings and loan associations in competition with the business of national banks.

Appellee seeks to sustain its proposition by reference to the Home Owners Loan Act of 1933,[28] the Joint Stock Land Bank Act of 1916,[29] and the National Agricultural Credit Corporation Act of 1923,[30] together with two Federal Court decisions.[31]

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[28]12 U.S.C. §1461, et seq.

[29]12 U.S.C. §932.

[30]12 U.S.C. §1261.

[31]*Union National Bank of Clarksburg, et al.* v. *Home loan Bank Board,* 233 F. 2d 695, and *U.S.A.*, ex rel *State of Wisconsin* v. *First Federal Savings and Loan Association and Federal Home Loan Bank Board,* 151 F. Supp. 690.

These cases are not in point. They hold only that banks are not "local thrift and home-financing institutions **in the sense in**

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Appellee in effect argues (Brief p. 159) that because

(a) **shares** of Joint Stock Land Banks and National Agricultural Credit Corporations were protected from state taxation at a greater rate than other moneyed capital (to the same degree as national bank shares), and

(b) **shares** of federal savings & loan associations (organized under the Home Owner's Loan Act of 1933) are not protected from state taxation at all, and the only limitation upon state taxation of federal **associations** is that such associations be taxed at no greater rate than the state imposes upon state associations,[32]

(Continued from page 21)

which that term is used in Sec. 5(e) of the Home Owners' Loan Act." (233 Fed. 2d 696) because, while it is recognized that "'These savings and loan associations do some of the same things which banks do, obviously they do not do a general banking business.'" (151 Fed. Supp. 697) **Identity of character** of competing institutions, while perhaps vital to Sec. 5(e) of the Home Owners' Loan Act, **is immaterial under R. S. 5219.** Competition in the employment of capital, recognized as existing in *Clarksburg*, at page 697, *supra*, is of no consequence under Sec. 5(e), whereas, it is the determining factor under R. S. 5219.

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[32]The Home Owner's Loan Act of 1933 provides some limited protection against state taxation as to Federal savings and loan **associations, as corporations.** It does not deal in any way with **state associations or their shares. Nor does it protect** in any way **an individual's investment in shares** of a Federal association against state taxation.

Paragraph (h), §1464 of the Home Owners Loan Act of 1933, in dealing with taxation of **associations** by the **United States** uses the words:

> "their franchise, capital, reserves and surplus and their loans and income"

and insofar as paragraph (h) imposes a restriction on **state** taxation uses the same substantive words.

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that it must follow that **shares** of savings and loan associations are not other moneyed capital under R. S. 5219. This is a non-sequitur.

Because shares of national banks and of Joint Stock Land Bank and National Agricultural Credit Corporations are given broader protection from discriminatory state taxation —i.e. not at a greater rate than other moneyed capital—, than are shares of federal savings and loan associations (which are given none), it does not follow that such associations' shares are not other moneyed capital within R. S. 5219.

Moneys invested in and employed by a business is not "other moneyed capital" under R. S. 5219 merely because a federal statute does or does not afford it protection from discriminatory state taxation, in a manner comparable to that afforded national banks or their shares. For example, money invested and employed by individuals in a business loaning moneys secured by mortgages, by partnerships or by corporations engaged in such business, has been held by this court to be other moneyed capital under R. S. 5219. Such investments are not protected from state tax discrimination by federal or other statute. They constitute other moneyed capital because they fall within the definition of other moneyed capital, as announced by this Court in *Mercantile* and in later cases.

(Continued from page 22)

There is nothing in paragraph (h) in relation to **state** taxation of "**shares** of such association."

There is not in the instant case a question of taxation of national **banks** as compared with savings and loan **associations** but a comparison of the taxation of shares of national banks as compared with "shares of such associations." The tax on the **bank shares** is "5½ mills upon each dollar of the capital account of such * * * bank * * * represented by such shares" and on the **savings and loan shares** is "1/25 of 1% [2/5 mills] on the paid in value of their shares."

Shares in joint-stock land banks or in national Agricultural Credit Corporations are not moneyed capital under R. S. 5219 because of 12 U.S.C. 932 or 12 U.S.C. 1261 (the statutes under which they are organized)—which protects them from state taxation comparable to that provided shares of national banks—but they are or are not moneyed capital, depending upon whether or not they have the attributes of moneyed capital, as defined by this Court in *Mercantile* and later decisions. So too, with shares in federal savings and loan associations (organized under the Home Owners Loan Act of 1933). They are or are not other moneyed capital because the moneys invested in and employed by such association have or have not the attributes of other moneyed capital, as defined by this Court, and not because Congress did or did not give them as broad protection as shares in Joint Stock Land Banks or in Agricultural Credit Corporations.

In enacting the 1933 Act, Congress was not dealing with state taxation of national bank shares. Congress had long before passed R. S. 5219, completely covering that subject. If Congress had intended to withdraw shares in federal associations, it would have so provided in R. S. 5219 or would have so provided in the 1933 Act. It did neither. Nor, is there any inconsistency between giving full effect to both. The 1933 Act does not repeal R. S. 5219, either expressly or by implication, by withdrawing from the purview of the basic statute protecting national bank shares any "other moneyed capital . . . coming into competition"—whether invested in federal associations, state associations or otherwise.

IV

Contrary to Appellee's contentions [33]—

This Court is not foreclosed from determining whether or not under present day operations and conditions a state, subject to R. S. 5219, has "just cause" to dis-

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[33] Appellee's Brief pp. 148, 152.

criminate against national bank shares by "partially exempting" [34] savings and loan associations or their shares from taxation—merely because there may have been just cause in prior times.

The paramount Congressional limitation provided in R. S. 5219 is the prohibition against discriminatory taxation by a state against national banks and their shares in favor of other moneyed capital coming into competition with the business of national banks. This is a federal legislative injunction against the states and cannot be overturned or avoided by a state with impunity.

There is no exemption or exclusion of moneyed capital invested in and employed by savings and loan associations from the operation of R. S. 5219 in R. S. 5219 or in any other Federal law.

Because savings and loan associations of prior times

(a) were not in competition with the then business of national banks (when national banks were not empowered to make mortgages or to take savings) (cf. *Mercantile, supra*), and

(b) were then small quasi-charitable, mutual non-commercial organizations where "poor people" banded together to save their small weekly wages to enable one another to build small homes,

it does not follow, as appellee urges, that this Court must blindly hold that whatever the public policy then was must be the public policy today and that what might have then been just cause to exempt, as a matter of inexorable, inflexible law, must now be labeled just cause today under the completely different facts and operations which now obtain.

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[34] No part of the shares of savings and loan associations are presently exempt from tax by the State of Michigan—they are merely taxed at a lower or preferred rate, which is a discrimination. (See Appellant's Brief, pp. 60-1.)

Such a doctrine urged by appellee is repugnant to what this Court has so eloquently and unequivocally held in *Brown* v. *Board of Education*, 347 U.S. 483; 98 L. Ed. 873, where it said at pp.492-3:

> "In approaching this problem, **we cannot turn the clock back** to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. **We must consider** public education **in the light of its full development** and its **present place** in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."

To like effect see *Tigner* v. *Texas*, 310 U.S. 141, 144, 145-7; 84 L. Ed. 1422; *City of San Antonio* v. *San Antonio Public Service Company*, 255 U.S. 547, 555-6; 65 L. Ed. 777.

As was stated by this Court in *Patton* v. *United States* 281 U.S. 276; 74 L. Ed. 854; at page 306:

> "The public policy of one generation may not, **under changed conditions,** be the public policy of another."

The so-called exemption doctrine of *Mercantile, supra,* (mutual savings banks) was predicated upon a finding of "just cause" by the Court in the ~~setting~~ of those days (1887). When all intangible property was considered to be "moneyed capital"[35]—even though not in competition with

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[35]The early cases considered that all types of intangible property were included in "moneyed capital" under R. S. 5219; *Boyer* v. *Boyer* 113 U.S. 689, 28 L. Ed. 1089 (1885). However, beginning with *Mercantile* "moneyed capital" more and more was held to be money employed in a business whose business was money and such business came into competition with the business of national banks. Competition has become the controlling test of what constitutes "moneyed capital" under R. S. 5219. In 1923, Congress codified the decisions of this Court making competition the controlling test.

the business of national banks—an exemption of other than "a material part" of all of such other moneyed capital (a "partial exemption") did not violate R. S. 5219 *Hepburn* v. *School Directors* 90 U.S. 480; whereas an exemption of a "very material part" of all such other (non-competing) moneyed capital did violate R. S. 5219, *Boyer* v. *Boyer* 113 U.S. 689, 693. However, as the concept of "moneyed capital" changed, the so-called partial exemption doctrine was no longer necessary to permit a state to exempt or prefer intangibles that did not compete with national banks. Accordingly, that doctrine was no longer followed by this Court and has not been discussed or mentioned by this Court in any case under R. S. 5219 since 1899—for over 61 years. We do not believe that such doctrine presently obtains.[35a] We submit that competition is now the sole and controlling test—so

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[35a] Contrary to appellee's contention (Brief pp. 199-202), *Hartford* is not based upon the proposition that under the facts of that case that R. S. 5219 was violated because there was a "total exemption of all other moneyed capital", nor is it comparable to *Boyer* v. *Boyer* (where competition was not a factor in determining a violation under R. S. 5219). *Boyer* was not even cited in *Hartford*. The Court carefully pointed out in *Hartford* that in respect to the tax discrimination in favor of other moneyed capital: "It is not sufficient to show the discrimination alone" (p. 552). The Court said:

> "The validity of the tax complained of depends upon whether or not the moneyed capital in the state thus favored is employed in such a manner as to bring it into substantial competition with the business of national banks." (p. 552)

Contrary to appellee's suggestion (Brief p. 199) about "across-the-board exemptions" in *Hartford*, this Court throughout its opinion emphasized that:

> "Competition may exist between other moneyed capital and capital invested in national banks, serious in character and therefore well within the purpose of §5219, even though the competition be with **some but not all phases** of the business of national banks." (p. 557)

(Continued on next page)

long as the competition (favored taxwise) is substantial in amount and is substantial when compared with the capitalization of national banks. *Hartford, Minnesota, Anderson, Richmond.* (See Appellant's Brief pp. 32-7).

However, even if an exemption doctrine does exist, an exemption necessarily must be based upon "just cause". *Mercantile, supra,* p. 623. To now hold, as appellee suggests, that this Court is powerless to review the facts and conditions of the present day to determine whether or not such just cause exists would mean that federal instrumentalities (national banks) would be subject to the uncontrolled action of state legislatures as to what might or might not be exempt from R. S. 5219. That the safeguards assured federal instrumentalities under Federal law (R. S. 5219) against state tax discrimination should be in the sole control of the state—not even subject to challenge before or review by a Federal Court, as appellee contends, is unthinkable.

There is no just cause for the State to exempt or prefer tax wise moneyed capital invested in savings and loan associations.

We respectfully submit that the record is replete with evidence, cited (with complete record references) in Appellant's Brief pp. 65-86; 18-24, to impel this Court to conclude that there is no just cause for the State of Michigan—in the face of R. S. 5219—to prefer savings and loan associations or their stockholders, when such associations are in substantial

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(Continued from page 27)

"The restriction [R. S. 5219] applies as well where the competition exists only with respect to **particular features** of the business of national banks . . ." (p. 556)

The Court continued to refer to competition (favored taxwise) in:

". . . **particular phases** of banking (p. 558) . . . **some** though **not all** of the business carried on by national banks." (p. 558-9)

competition with an important and essential phase of the business of national banks.

The modern savings and loan associations—unlike those of the early days—are no longer small, neighborhood organizations of "poor people," banded togther to husband their weekly wages to provide funds to enable one another to build small homes. They are no longer mutual nor are they non-commercial, operated on a quasi-charitable basis as in the early days.

Today, these associations not only (a) are the principal competitors of national banks in the residential mortgage lending business, but (b) are powerful, rapidly growing financial institutions, operating commercially for a profit, seeking their investment share capital from the general public of all economic and income classes, not only of wage earners, but mostly from business men, professional people, corporations, partnerships, trusts, and pension funds. They no longer are mutual in operation. The interest of the investors is diametrically opposed to that of the borrowers.

Profit is the prime object and motive of the investors and of the associations. (R. 330a, 343a, 344a, 437a, 467a, 494a, 495a). The Attorney General of Michigan successfully argued to the Michigan Supreme Court that "A building and loan association **is a private** corporation **for profit.**" (See Appellan't Brief, footnote 50, p. 57) and that "payments on shares in savings and loan associations are not deposits," but are "purchases of **stock** therein" (*supra*, p. 12).[36]

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[36]Notwithstanding, the Attorney General **now** argues to the direct contrary, saying (Appellee's Brief, p. 50):

"**. . . the associations are not private profit institutions with capital stock.**"

The record is clear that the modern savings and loan associations do no more to encourage thrift savings or home ownership than do national banks today.

Whatever reason may have prompted Michigan in the early days to exempt savings and loan associations no longer obtains. Michigan since 1939 has taxed such associations and their shares. (See Appellant's Brief pp. 22, 77). Whatever reason may have prompted Congress to exempt savings and loan associations from federal income taxes, no longer obtains, Congress in 1951 having removed the tax-exempt status of these associations.[36a] (See Appellant's Brief pp. 22-3; 77.). Congress never exempted federal savings and loan associations from state taxation.

[36a] Contrary to appellee's contentions (Brief pp. 166-7), Congress in the Senate Finance Committee Report, 82nd Congress, 1st Session, Report 781, stated its intention as follows:

> "Section 313 of your committee's bill removes the exemption of savings and loan associations . . . and those chartered by the Federal Government and **taxes them as ordinary corporations.**"

In respect to the deduction for dividends paid out by savings and loan associations, since such associations normally pay out most of their annual net earnings in dividends, like certain other corporations or business enterprises where most of the earnings are paid out in dividends each year, Congress permitted the associations to deduct the amount of the dividend pay-out in computing the taxable income of such corporation. Compare the dividend paid deductions, Sec. 591 of Internal Revenue Code of 1954 (re savings and loan associations) with comparable deduction provisions under Sec. 852(b) (2) (D) (for regulated investment companies); and Sec. 858 (for Real Estate Investment Trusts, which "except for the provisions this part would be taxable as a domestic corporation.") The amount of earnings retained each year not paid out to investors in each case is taxed at the normal and surtax rates applicable to domestic corporations.

Moreover, the deduction from income permitted associations for the addition "to reserve for bad debts" provided by Section

(Continued on next page)

Notwithstanding the foregoing and Appellant's Brief, which is replete with record references, appellee (Brief pp. 152-3) would have this Court believe that there is no evidence in the record to show that the modern associations operate in a basically different way than did associations of early days (pre-1900). Appellee says (Brief p. 153) that there were only two witnesses (Woodworth and Doty) who testified on the subject and that they denied that there was any significant change since early times.

The testimony of these two witnesses clearly does not sustain appellee's assertion. Doty (whose testimony is referred to by appellee in footnote 150, p. 153 of Appellee's Brief) did not testify as to associations of times earlier than 1937 (R. 734a-747a).

(Continued from page 30)

593 of the Internal Revenue Code 1954 (originally Sec. 313 of the Revenue Act of 1951) was intended to provide a formula to cover "bad debts"—loan loss contingency, like commercial banks, to achieve the same general result as the Commissioner of Internal Revenue's regulatory policy for banks, providing for a 20-year moving average of actual loan loss experience. See Internal Revenue Bulletin 1951, pp. 475, 478, 563, 627. The fact that this reserve provision for savings and loan associations has proved to be substantially greater than their loan loss experience does not indicate an intention of Congress to prefer such associations. Because of serious dislocation caused thereby, there is being presented to and Congress is now considering corrective legislation regarding this bad debt reserve provision to bring it in line with the average loan loss experience of associations over a period of years.

Shareholders of savings and loan associations since 1941 have been subject to federal income taxes on **all dividends received** (previously, since 1933, dividends were exempt from the normal tax of 3%, but not the surtax). Federal Tax Regulations, 1960, Sec. 1.103-2(b).

Professor Woodworth testified that he did not know of any change in character or practices since 1933 (865a). On cross-examination, however, he **was obliged to admit that there had been changes since earlier times.**[37] (R. 893-9).

These "considerable changes" he described as "technical" because the "character" of savings and loan associations was the same; they still engaged primarily in the residential mortgage business from funds obtained from savings ["share capital"] accounts (R. 894-5).

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[37] Woodworth admitted on cross-examination (R. 897a) that

> "In the early days of these institutions, the transactions of the associations were confined to members and no one could participate in the benefits they afforded without becoming a shareholder."

and that "in the early times . . . a borrower had to be an investor" (893a). "Stockholders would be committed to make a definite weekly or monthly payment to the association for a period of time and if they failed to honor their obligations, there would be fines or penalties" (R. 893a). ". . . only borrowers could be shareholders of the association, they didn't have outside borrowers except from shareholders" (894a; 899a).

Woodworth however admitted that in modern times (1952)—"the borrower did not have to be an investor any more" (R. 895a) "investors were primarily interested in returns from their investment" (R. 895a) and "borrowers were not interested in the investors" (R. 895a). Previously, Woodworth testified that borrowers from savings and loan associations were only interested in obtaining the best mortgage terms available; whether they borrowed from associations or banks was unimportant to them (R. 868a), whereas the higher the profits made on mortgage loans, the better the return to investors and they were interested primarily in return on their investments (R. 873a; 895a).

Professor Woodworth agreed that

> "**More and more** investing members are becoming simply savers, while borrowing members find dealing with these **savings and loan associations only technically different from dealing with other mortgage lending institutions** in which the **lending group is distinct from the borrowing.**" (R. 899a).

On the other hand, Congress in 1951, deemed these changes so substantial that it found that there no longer was any "just cause" to exempt savings and loan associations from federal taxation. The Senate Finance Committee Report, 82nd Congress, 1st Session, S. Rept. 781 said:

> "In the early days of these institutions, the transactions of the associations were confined to members; and no one could participate in the benefits they afforded without becoming a shareholder. Individuals became investing members of these organizations in the expectation of ultimately becoming borrowing members as well. Membership implied not only regular payments to the association for a considerable period of time, but also risk of losses. Members could not cancel their memberships or withdraw their shares before maturity without incurring heavy penalties. The fact that the members were both the borrowers and the lenders was the essence of the 'mutuality' of these organizations.
>
> "Although many of the old forms have been preserved to the present day, few of the associations have retained the substance of their earlier mutuality . . . borrowing members find dealing with a savings and loan association only technically different from dealing with other mortgage lending institutions in which **the lending group is distinct from the borrowing group.** . . .
>
> **" . . . since savings and loan associations are no longer self-contained cooperative institutions as they were when originally organized there is relatively little difference between their operations and those of other financial institutions which accept deposits and make real-estate loans."**

We submit that there is no "just cause" for the state to discriminate in favor of the shareholders of these modern savings and loan associations drawn from all economic classes of the public at large. These associations are **"private** corporations for **profit,"** employing their great capital in the residential mortgage loan business — competing with na-

tional banks—seeking business from the general public at large of every economic class and strata.

V

Contrary to Appellee's Contentions

A small committee of Michigan Bankers Association cannot bargain away important safeguards prohibiting tax discrimination by a state against national banks guaranteed by Congress under R. S. 5219.

Appellee, in its brief (pp. 29-34, and elsewhere) infers that validity can be breathed into Act 9 merely because a small tax committee of the Michigan Bankers Association thought it "to be preferred to an income tax."[38] and agreed to it in lieu of an income tax law.

Appellant and the other members of the Michigan Bankers Association were not consulted about Act 9, did not agree that the legislature could discriminate taxwise against them in favor of the savings and loan associations and their shares, were not apprised (until 5 or 6 years thereafter) of any "agreement" made by the Committee with the legislature to "help the State defend any attack on the legality of the tax . . . if the validity . . . was questioned by any national bank."[39] The "agreement" was not voted upon by the members nor approved by them.

Whether the committee members were from "larger banks having interlocking directors with savings and loan associa-

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[38]Statement and brief of Appellant re Appellee's objections to motion of 68 banks in Michigan for leave to file brief, pp. 2, 4 and 10; Appellee's objections to motion of 68 banks, p. 20.

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[39]Appellant's statement and brief re Appellee's objections, pp. 2 and 3; Appellee's objections, p. 20.

tions or else received very substantial deposits from them"[40] or from banks which did not do as large a residential mortgage loan business as many out-state banks in Michigan (and were not then as seriously affected by savings and loan association competition) does not appear. At all events the president of the First National Bank of Burr Oak Michigan in a letter to the Michigan Bankers Association critical of the Committee's position stated that it was "at variance with everything the writer has ever heard or read at bank meetings or from bank publications."[41] Such position of the association is certainly at variance of that of a number of Michigan banks, 68 of which joined with Community National Bank of Pontiac to file a motion for leave to file a brief amica curiae and a brief in this proceeding.[42]

It is undisputed that in 1952 the Michigan legislature imposed a tax upon banks which it concluded was unconstitutional as to national banks (Appellee's objections to Motion of 68 banks, p. 9 par. 1). Act 9 was then submitted in lieu thereof. The fact that it was thought necessary by a committee of the legislature to have an "agreement" of a small tax committee of the Michigan Bankers Association "to help

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[40]Letter of President of First National Bank of Burr Oak, Michigan to Michigan Bankers Association, Appellant's statement re Appellee's objections, affidavit, pp. 7 and 8.

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[41]ibid

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[42]Motion of 68 banks in Michigan for leave to file attached brief as amici curiae and brief.

Contrary to Appellee's unsupported insinuation (brief p. 33, footnote 84) Appellant has not paid nor agreed to pay the fee of counsel amici or the cost of printing the motion or the brief amici, Community National Bank alone having undertaken all the expense and fees thereof (see response of Michigan banks to Appellee's objections). Nor has Appellant paid or agreed to pay fees or costs in connection with the intervention proceedings of the intervenors.

the State defend any attack on the legality of the tax [Act 9]" indicates that the law was of doubtful validity at the time of its enactment.

For a full discussion and supporting papers see motion, statement, objection and briefs filed in this proceeding as listed in the footnote below.[43]

At all events one thing is clear—appellee's suggestion to the contrary notwithstanding—Act 9 either violates R. S. 5219 or not depending upon the law and the evidence in this case and not because some committee made a bargain "to help the State defend [Act 9] from any attack . . . if the validity . . . was questioned by any national bank". We submit that upon the facts in this cause and the applicable law Act 9 is in conflict with R. S. 5219.

Respectively submitted,

Thomas G. Long
Victor W. Klein
Philip T. Van Zile, II
Harold A. Ruemenapp

Attorneys for Appellant

Michigan National Bank

January 11, 1961

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[43]a. Motion of 68 banks in Michigan have leave to file brief amici curiae;

b. Objections of Appellee to motion;

c. Statement and brief of Appellant re Appellee's objections;

d. Response of Michigan banks to Appellee's objections.

APPENDIX A

No. 3839 Shares 23¼

UNION BUILDING AND LOAN ASSOCIATION, LIMITED

Lansing, Michigan

This certifies that Alta F. Ward is the owner of Twenty-three and one-fourth **shares of the Fully Paid Stock** of the Union Building & Loan Association, Limited, of Lansing, Michigan, of the par value of $100 each, for which she has paid twenty-three hundred twenty-five dollars ($2325.00). This **certificate of stock** is issued to and accepted by the holder thereof subject to the terms and conditions of the By-Laws of said Association and subsequent amendments thereto; and all acts of its Board of Directors and to such rules and regulations as may be made from time to time by the Secretary of State.

In Witness Whereof, the Union Building & Loan Association Limited, has caused the corporate seal to be affixed and these presents to be signed by its duly authorized officers, this first day of January 1952.

W. S. ANDERSEN, *Secretary-Treasurer*

H. M. ANDREWS, *President*

(In case of optional shares, similar terms and conditions, and references to "shares of stock" are set forth at the beginning of a book delivered to the investor)

Exhibit 94B

Authorized **Capital** $750,000.00

Certificate Number 936-F Number of **Shares** 18

MARSHALL SAVINGS AND LOAN ASSOCIATION

of Marshall, Michigan

Fully-Paid **Stock Certificate**

This certifies that Ernest E. Hoover and/or Francis M. Hoover has paid the full par value of One Hundred Dollars ($100.00) per **Share** for Eighteen Fully-Paid **Shares**, and is a member of the undersigned.

This Certificate is issued and by the acceptance hereof is held subject to all provisions of the laws of the State of Michigan, the articles of association and by-laws of the undersigned, and is transferable on the books of the undersigned by the holder hereof, in person or by duly authorized attorney, upon surrender of this certificate properly endorsed. The undersigned may treat the **holder of record** hereof as the owner for all purposes, without being affected by any notice to the contrary, until this certificate is transferred on the books of the undersigned. Certificates will not be transferred unless and until the transferee has made proper application for membership in, and has been accepted as a member of, the undersigned.

Witness, the seal of the undersigned and the signatures of its duly authorized officers, this the first day of July A.D., 1952.

Marshall Savings and Loan Association

Secretary-Treasurer *Vice-President*

Exhibit 52